

**Piercing Me Softly: Achieving Justice without ostensibly
Piercing the Corporate Veil after *Prest v Petrodel Resources
Ltd*
(Piercing the Corporate Veil after *Prest v Petrodel Resources
Ltd*: A Remedy of Last Resort) Munby J. in *Ben Hashem*
approved para 103**

On 12 June 2013, the UK Supreme Court

- That the authorities show that the separate legal personality of the company could not be disregarded unless it was being abused for a purpose that was in some relevant respect improper, para. 6.
- The 3 possible legal bases on which the assets of Petrodel might be available to satisfy the lump sum order against the husband, para. 9.
- Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose, para 16.
- Most cases in which the corporate veil was pierced could have been decided on other grounds, para 27.
- In *Gencor ACP Ltd v Dalby* [2000] ... Rimer J considered that he was piercing the veil. But I do not think that he was, para 31.
- The same confusion of concepts is apparent in Sir Andrew Morritt V-C's analysis in *Trust AB v Smallbone (No 2)* [2002] ... As I read the V-C's reason for giving judgment against Mr S. he did so on the concealment principle ... This conclusion did not involve piercing the veil, and did not depend on any finding of impropriety, para 32.
- In *Gilford Motor* and *Lipman* the ddts had a liability which arose independently of the company while in *Trustor* and *Gencor* where the evasion pple was not engaged, neither ddt used the company's separate legal personality to evade a liability which they would otherwise have had as in *Gilford Motor* and *Lipman*, para 33.
- It is clear from *VTB Capital* that the veil will not be pierced to create a new liability that would not otherwise exist, para 34.
- I conclude that there is a limited principle of English law which applies where a person is under ... The court may then pierce the veil for the purpose and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the co's separate legal pers. I therefore disagree with the CA in *VTB Capital* who suggested that it may be appropriate to pierce the veil even if it is not necessary to do so. para 35.

- In the present case, the husband has acted improperly in many cases, but in doing so, he was neither concealing nor evading any legal obligation owed to his wife, para 36. (To add that this means that under the new test the veil will not be pierced if there was no concealment or evasion.)
- If there is no justification as a matter of general legal principle for piercing the corporate veil, I find it impossible to say that a special and wider principle applies in matrimonial proceedings by virtue of section 24(1)(a) MCA 1973, para 37.
- It follows that the only basis on which the companies can be ordered to convey the seven disputed properties to the wife is that they belong beneficially to the husband, para 43, 84.
- The basis for finding that the matrimonial home was held on trust for the husband is that the six properties including the matrimonial home were acquired by PRL before it began operations and began to generate funds of its own, para. 48.
- Although there is no general guidance, it is suggested that an asset say a mat home that is legally vested in a company may be considered to be beneficially owned by its controller, if the spouse owned and controlled the company then the home may be regarded as having been held on trust for him, para 52.

Lord Neuberger

- Cases concerned with concealment do not involve piercing the corporate veil, paras 61, 70.
- I agree with Munby J in *Ben Hashem* [2009] that if the court has power to pierce the veil it could only do so when all other, more conventional, remedies have proved to be of no assistance (and therefore I disagree with the CA in *VTB* [2012] who suggested otherwise), para 62.
- ... but the application of the doctrine, even if it exists, in these cases is unsound, as Munby J effectively indicated in *A v A* [2007] and *Ben Hashem* [2009] para 68(ii).
- It is also clear from the cases and academic articles that the law relating to the doctrine is unsatisfactory and confused. These suggest to me that there is not a single instance in this jurisdiction where the doctrine has been invoked properly and successfully, para 64, 79.
- The decision in *Gilford Motor* was not based on piercing the corporate veil, par 71.
- Also *Jones*. Invoking the doctrine there was not really necessary, para 73.
- I agree with Lord Sumption that the doctrine should only be invoked where a person is under an existing legal obligation ... which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control, para 81.

Lady Hale

- I am not sure whether it is possible to classify all of the cases ... neatly into cases of either concealment or evasion, para 92.
- Distinguishes between making someone liable for the company's liability and making the company liable for someone's liability, para 92. That the latter can only be done if the company was merely holding the property on trust for the person as here in *Prest*, para 93.

Lord Mance

Piercing the veil situations are likely to be very rare, para 100.

Lord Walker

- I consider that piercing the corporate veil is not a doctrine at all, in the sense of a coherent principle or rule of law. It is simply a label, often used indiscriminately to describe ... para 106.

Extending the Rule in Family Cases

The rule is more readily extended by judges in the Family Division where the court is prepared to lift the veil and cause property vested in a one-man company, which is the alter ego of the husband, to be transferred to the wife.

- *Nicholas v Nicholas* [1984], par 23.
- *Green v Green* [1993]
- *Mubarak v Mubarak* [2001] Bodey J held that for the purpose of claims to ancillary financial relief the Family Division would lift the corporate veil not only where the company was a sham but 'when it is just and necessary'.
- *Kremen v Agrest (No 2)* [2011] Mostyn J held there was a 'strong practical reason why the cloak should be penetrable even absent a finding of wrongdoing', para 23.

But Munby J warned against departing from the fundamental legal principle in

- *A v A* [2007] and in
- *Ben Hashem v Al Shayif* [2009] where the differences in approach between the Family Div and the Chancery Div was acute. Here he formulated 6 principles to be derived from family and non-family cases. The pples limit the instances of piercing the veil, thus upholding the rule in *Salomon*, (par 25).

Concealment Cases

- *Gilford Motors* – injunction granted against Mr Horne on this pple (par 29, 70).
- *Jones v Lipman* – specific performance decree on the concealment principle as against Mr Lipman

Evasion Principle

- *Gilford Motors*
- *Jones v Lipman* – decision against the company justified on the evasion principle.

VTB plc v Nutritek [2013] UKSC

- A lack of consensus in the judiciary on what the principle means paras 123-124, 128.
- Did the principle really exist? Para 124, exists in *Adams v Cape* - 127.
- Decision in *Gilford Motors* not based on piercing the corporate veil, a point made by Toulson J in *Yukong Line Ltd of Korea v R.I.* [1998] 1 WLR 294 at 308, para 134. See also Jason Neyers U. Toronto L.J. [2000] p. 220.
- The same point applies to *Jones v Lipman*, para 135.
- Para. 136 - see *Gencor* and *Trustor* cases re piercing the veil to impose liability on the company for the controller's liability as Mrs Prest sought in *Prest v Petrodel*. But in *Prest* this was achieved via a different route. Also see Lady Hale's distinction in para 92.
- In my view, abuse of the corporate structure (is not a ground for lifting the veil), para 143. (To add that this means that the veil should not have been lifted in the sham or façade cases. See Marc Moore below, p. 181, who argues that the practical ways in which the English courts have rationalised the Salomon exceptions is both wrong and doctrinally unsustainable. To add that perhaps the UKSC decision in *Prest* proves this).
- It follows from this analysis that I doubt that the decision in *Gramsci* can be justified, at least on the basis of piercing the corporate veil. In agreement with the CA, I think that the reasoning in that case involved a misinter. of the basis of the decisions in *Gilford* and *Jones*, para 147.

Antonio Gramsci Shipping Corp v Reoleto Ltd [19-June-2013] EWCA

- In the present state of English law (following UKSC in *Prest*), the court could only pierce the veil when a person was under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evaded or whose enforcement he deliberately frustrated by interposing a company under his control, paras 64-65.
- The veil will not necessarily be lifted only because the controller owns and controls the company which he formed for a fraudulent purpose. This is a legal question and the answer to it is a finding of at least mixed law and fact, if not one of pure law, para 45.
- The references in Lord Sumption's judgment in *Prest* [27] and [34] to "abuse of corporate personality" as justifying piercing the veil may appear to give some support to a policy-based approach. But it is clear from the decision that in the present state of English law, the court can only pierce the veil when ... para 65. (To add that after analysing past cases including *Gilford* and *Jones*, Lord Sumption [34] deduced that the cases "reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate personality." But to argue that as stated by Beatson LJ above in *Gramsci*, although this may look like Lord Sumption is favouring a broad approach allowing the court to pierce the veil wherever there is abuse of corporate legal personality, his decision significantly narrows when the veil may be pierced.
- In *Prest*, Lord Neuberger was of the view that there is a "lack of any coherent principle in the application of the doctrine of piercing the veil", [75] and Lord

Walker's view [at 106] was that it is not a doctrine in the sense of a coherent principle or rule of law but a label, para 66.

Adams v Cape Ind. [1990] Ch.

- Here, the CA refused to lift the corporate veil so as to expose the identity of the defendant as the controlling mind behind a complex arrangement through which potentially harmful asbestos products were marketed overseas. Slade LJ stressed that a member of a corporate group was entitled to use the corporate structure in such a way, (Moore, p. 182).
- Soundly condemned the idea of lifting the veil in the interest of justice.
- Slade LJ identified two grounds for piercing the veil, ie sham/ façade – the most common and agency – only succeeded in *Smith, Stone & Knight*, (Moore, p. 183.)
- Save in cases which turn upon the wording of particular statutes or contracts, the court is not free, to disregard the principle of *Salomon v A. Salomon* merely because it considers that justice so requires, para 536.
- Neither in this class of case (i.e. groups of companies) nor in any other class of case is it open to this court to disregard the principles of *Salomon* merely because it considers it just to do so, para 537. (To add that although *In re a Company* [1985] was not referred to, this is a rejection of Cumming-Bruce LJ's assertion therein referring to *Wallersteiner v Moir* that "in our view the cases before and after *W v M* show that the court will use its powers to pierce the corp veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration", from Cheng, p. 354).
- From the authorities cited to us we are left with rather sparse guidance as to the principles which should guide the court in determining whether or not the arrangements of a corporate group involve a façade within the meaning of the words used by the HL in *Woolfson*, para 543 (to reinforce re lack of coherent principle).

Ben Hashem v Ali Shayif [2008]

- Piercing the corp. veil was appropriate only where special circumstances indicated that it was a mere façade, *Woolfson v SRC*.
- Control of a co was not of itself enough to justify piercing, *Salomon*. Nor could piercing occur merely b/c it was thought necessary in the interest of justice. There had to be impropriety, *Ord v Belhaven Pubs*. And the impropriety had to be linked to the corp structure, *Trustor AB v Smallbone* [2001]

Mubarak v Mubarak [2000]

- Distinguishes b/w and deals with VP in two strands of authorities, that those decided in the company/commercial law sphere and those decided in the family law sphere and
- Reviews VP in family law cases and concludes that the precise extent of the Family Division's power to go directly against the property of a company owned or controlled by one of the spouses appears less than clear.

- The above conclusion derives from parallel CA decisions, ie *Crittenden v Crittenden* [1990] 2 FLR 361 and *Wicks v Wicks* [1998] 1 FLR 470 where the CA disowned the power, in the *Wicks* case power to sell land belonging to a company in which H had shares. These two CA decisions made no reference to *Nicholas v Nicholas* [1984] FLR 285 where held the power exists when the circumstances there specified pertain. Here CA held the veil could not be pierced regarding a company's ownership of the matrimonial home because minority interests in the company were owned by the husband's business associates. Dillon LJ said "if the company was a one-man company and the alter ego of H, I would have no difficulty in holding that there was power to order a transfer of the property, but that is not this case."
- Besides, company law does not recognise any exception to the separate entity principle based simply on a spouse's having sole ownership and control.
- Boden J noted that the company approach is different from the family approach and advocated for a rationalisation i.e. an adoption of a common approach by the Family Division and the Chancery Division.
- Boden J suggested that the FD can make orders directly or indirectly regarding a company's assets where (a) H is the owner and controller of the company concerned and (b) where there are no adverse third parties whose position or interests would be likely to be prejudiced by such an order being made, p. 7.
- I would add that lifting the veil is most likely to be acceptable where the asset concerned (being the property of an effective one-man company) is the parties former matrimonial home, or other such property owned by the company other than for day-to-day trading purposes, p. 8.
- As counsel has said, there does not seem to be any decided case in which the authorities in the family sphere have been considered in the company sphere nor do the authoritative textbooks of Palmer and Gore-Browne mention those family cases where lifting the veil has been discussed.

Articles

Thomas Cheng "The Corp Veil Doctrine: A Comparative Study ..."

- A perennial challenge facing the corporate veil doctrine has been attempt to increase its predictability ... pp 330-1 – from Marc Moore @ fn2, below, p. (to add that it is perhaps the open-endedness and unpredictable nature of the doctrine that has attracted much of the criticisms levied against it).
- The attitude of the English courts towards the veil doctrine has been a rollercoaster one oscillating from enthusiasm to outright hostility at times, p. 334. (This has culminated in the near demise of the doctrine by the UKSC in *Prest.*) Cheng divides the history of the rule into 3 periods (ibid).
- Until the late 1970s English courts demonstrated considerable willingness to pierce the veil when justice so required, p. 331 (to add that but the UKSC has now stated that those cases were not really veil piercing cases and the decisions could have been reached on different basis – under possible sub-heading 'veil –piercing rule reformulated?')

- Lord Denning took the lead in veil piercing and in *DHN Food Distributors Ltd v TH LBC* [1976] called for judicial flexibility towards corporate personality, a position described as commendable by Cheng, p. 338.
- In the *D.H.N.* case, Lord Denning took a single economic unit theory approach declaring that the group of companies was virtually the same as a partnership, p. 339, 388 et seq.
- Single Economic Unit argument rejected by the CA in *Bank of Tokyo v Karoon* [1987] A.C. 45, saying “we are concerned not with economics but with law. The distinction b/w the two is, in law, fundamental and cannot here be abridged”, p. 340.
- Veil piercing finally weakened in *Adams v Cape* where CA declared that the use of the corporate structure to limit future liabilities is an inherent feature of English company law and practically ruled out veil piercing in tort cases, p. 340. (To discuss the history of veil piercing under possible sub-heading “The Veil-piercing Trajectory from Salomon to Prest: A Brief Survey” – see pp 334-342 and Moore)
- But HL pierced veil recently in *Stone & Rolls Ltd v Moore* [2009] p. 394.
- In the earlier non-veil piercing case of *Lee v Sheard* [1956] 1 QB compared the r/s b/w a shareholder and his company to a partnership, p. 339.
- The paradigmatic corporate veil case is one in which the separate corp pers is disregarded and the shareholders are held liable for the co’s debts. ... Such cases may be called shareholder liability cases because veil piercing results in shareholder liability for corporate debts, p. 343 (to add that as below, these are forward piercing cases unlike *Prest* where the claimant sought to make the co responsible for the shareholder’s liabilities).
- (sub-head – ‘The primacy of Justice in Corp Veil cases’ see Slade LJ’s in *Adams v Cape* and Cumming-Bruce LJ’s in *In re a Company* above and at pp. 354)
- Pp. 366-7, (to argue here that the *China O S v Mitsui* [1995] and the *In re Darby, Brougham* [1911] p. 358- cases show that the evasion and concealment categorisation predate *Prest*.)
- The time of incorporation of the subsidiary, argues that it should precede the incurrance of the legal obligation as in *Yukong v RIG*, pp. 367-9.
- In *Stone & Rolls Ltd v Moore Stephens* [2009] (primarily concerned with attribution of shareholder intentions to the company) the HL pierced the veil between a co and its sole beneficial shareholder to impute his fraudulent intentions to the company, p. 394. To analyse re Lady Hale’s distinction in *Prest*.
- Interestingly, *Stone & Rolls* is not a case of forward veil piercing – the imposition of shareholder responsibility for corporate liabilities – which is the usual type of veil piercing. It instead involved reverse veil piercing. The company was deemed responsible for its shareholder’s conduct. Reverse piercing is usually considered more controversial than forward piercing because the company’s stakeholders – must share the company’s assets with the shareholder’s creditors. Given that in most cases, a company has more stakeholders than an individual has creditors, reverse piercing affects more innocent parties and raises more fairness issues than forward piercing, pp 395-6 & 372, 386, 393-. (To analyse forward and reverse piercing re Lady Hale’s distinction in *Prest* under possible sub-head ‘the forward and reverse piercing distinction’). *Stone & Rolls* [2009] reverse piercing p. 395.

Marc Moore: “A Temple Built on Faulty Foundations: Piercing the Corp Veil...” [2006] JBL

- While the *Salomon* case was a small private company... the basic principle therein was extended by the CA in 1991 (*Adams v Cape?*) to cover the more complex scenario of a MNC operating abroad through its subsidiaries, p. 180.
- The general reasoning of the courts regarding the exceptions to *Salomon* (e.g. the agency exception as in *Smith, Stone & Knight*, single economic unit as in *DHN Food Dist v TH*, etc) is confusing and at times contradictory, p. 183.
- Argues that Slade LJ’s insistence on the exclusivity of ‘sham’ as the only basis for piercing the veil in *Adams v Cape* maintains the integrity and autonomy of the corporate form in *Salomon* and prevents it from abuse at the same time, pp. 184.
- Reviews old cases and argues therefrom that sham was a recognisable exception to *Salomon* even though *Salomon* was barely mentioned in these cases, The non reference to *Salomon* in these 4 cases suggests that sham developed independently of *Salomon*, pp 191 fn 40.
- Argues from *Ord v Belhaven Pubs* that the motivation of ltd liability to form a co should not be a ground for lifting the veil, as this was recognised in *Salomon*, pp 199 et seq, fn 62...

Jason Neyers: “Canadian Corporate Law, Veil-Piercing and the Private Law Model Corporation” (2000) 50 U. Toronto L.J. 173

- The *Salomon* principle is seen as the central and foundational pple of corporate law and is rarely questioned. As Lord Templeman claims (in ‘Forty Years on (1990) 11 Co. Law 10) it is the ‘unyielding rock’ on which corporate law is constructed, p. 179. (To add that the UKSC decision in *Prest* upheld *Salomon* by restricted circumstances under which the veil might be pierced).
- The separate entity pple is directly contradicted by other common law ... pp. 179-183 et seq (To argue that the piercing the veil exceptions are not a contradiction of the pple. Every rule has its exceptions and the exceptions cannot be seen as a contradiction of the rule. Piercing the veil upholds the integrity of *Salomon* by preventing abuse of the principle.)
- Argues that the agency exception really does not violate corp pers, pp. 181 et seq. See also Marc Moore supra, p. 183.
- Gilford really has nothing to do with either narrow veil-piercing or violations of limited liability, p. 220. See also *VTB v Nutritek* above.

Peter Oh, “Veil-Piercing Unbound” 93 B.U.L. Rev 89, 2013 (quote Stephen Bainbridge at note 12: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=236967)

- But from its inception, veil-piercing has been an abysmal failure. There is no uniform test for veil-piercing, which typically requires demonstrating that a corporation was an ‘alter ego’ or ‘instrumentality’ controlled or dominated by a

shareholder to perpetuate a fraud, wrong, or injustice that proximately caused loss or injury to a plaintiff, p. 90.

- *Veil-piercing (VP) is misapplied because it is misconceived. For about a century VP has been regarded as an exception to, and thus inextricably linked with the predicate pple of limited liability. Hence, what one makes of veil-piercing depends on the first instance on one's view of ltd liability. Pursuant to this view VP is justified potentially only when ltd liability is not. [This stems from ltd liability being framed as loss-allocation ...] p. 91. (To analyse under possible sub-heading "Dissecting The Ltd Liability and VP R/s". see P. Bailey, p. 4)
- Argues that once the appropriate limits of ltd liability are understood, VP can police those limits, pp. 99.
- Pure VP enables a pff to reach the personal assets of only a shareholder, p. 102. (To use re forward and reverse VP).
- As a result ltd liability has spawned a group of cases that look and stumble like VP but in fact are not. (pp. 102-3).
- *This mutation belies how ltd liability and VP are misaligned. The rationales for ltd liability justify its preservation within a broad range of scenarios. But that justification does not quadrate perfectly with the scope of VP qua unlimited liability, p. 103.
- According to Hansmann and Kraakman, "to decide that there are any circumstances in which shareholders can be held liable for tort damages ... is to discard ltd liability in pple" pp. 109-110 (although reference here is made to tort only, to buttress my argument that by restricting the operation of the VP rule to only when ... the UKSC upheld ltd liability in *Prest*.)
- Originally conceived as a provisional remedy, piercing was available incidentally and only when no relief could be had from a corporation, p. 113.
- Examines alternative methods of achieving justice in the US context such as constructive trust, p. 123.

Case Comment, Co. L. Newsletter 2013; "Supreme Court Refuses to Extend Piercing the Veil of Incorporation"

- Comments on UKSC and lower courts' decisions in *VTB Capital v Nutritek*.
Existence of Principle Questioned
- CA rejected the submission that there is no such principle as piercing the veil and approvingly cited Lord Keith's speech in *Woolfson v Strathclyde Regional Council* [1978] that "it is appropriate to pierce the veil only where special circumstances exist indicating that it is a mere façade concealing the true facts."
- CA commented that it was not open to it to question the existence of the VP pple.
- CA rejected piercing the veil on a contract claim that was not recognisable in English law. That it was appropriate to pierce the veil only where special circumstances existed indicating that it was a mere façade concealing the true facts.
- Cites Ottolenghi "From Peeping behind the Corporate ... (1990) 53 MLR 338.
- The UKSC was prepared to assume in *VTB* that the power to pierce the veil on appropriate facts existed, starting with *Salomon* which is seen as representing an early, though failed, attempt to pierce the veil.

- Lord Neuberger in the UKSC agreed that there is no principled basis upon which it can be said that one can pierce the veil from the fact that “the precise nature, basis and meaning of the pple are all somewhat obscure, as are the precise nature of circumstances in which the pple can apply”.
- He warned that words such as façade, sham, etc may be useful metaphors, but that “such pejorative
- He believed that not all the veil piercing cases can be explained as inconsistent with pple and unnecessary to achieve justice.
- According to Lord Neuberger abuse of rights, ie the corp structure is not a separate ground for piercing the veil. It may have been another way of describing use of the company as a façade to conceal the true facts or an additional requirement before the veil will be pierced, but it would be an illegitimate extension of the circumstances in which the veil can be pierced.
- Although Lord Neuberger pointed to piercing the veil in certain circumstances “in order to defeat injustice”, this is not an expansion of the pple and the façade requirement remained the test.

Peter Bailey, “Lifting the Veil becomes a Remedy of ...” Co. L. Newsletter, 2013.

- The ltd liability and VP r/s from Lord Sumption’s speech.
- Lord Sumption felt that the terms façade and sham which were rather vague reflect two distinct pples, ie concealment and evasion.
- That the concealment pple did not involve piercing the veil at all.
- The UKSC held that the court’s power to pierce the veil could only be exercised “when all other, more conventional, remedies have proved to be of no assistance”

Easterbrook & Fischel; “Limited Liability and the Corporation” [1985] 52 Chi. L.Rev. 89

- Limited liability is a fundamental pple of corporate law. Yet liability has never been absolutely limited. Courts occasionally allow creditors to “pierce the corporate veil,” which means that shareholders must satisfy creditors’ claims. ‘Piercing’ seems to happen freakishly. Like lightening, it is rare, severe and unprincipled. There is consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law, (To use re Ltd liability and VP r/s). p. 89.
- Discusses academic explanations for limited liability, pp 90-97.
- VP cases may be understood, at least roughly, as attempts to balance the benefits of limited liability against its costs, p. 109